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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 308

FRANK PIUS, ALIAS IGNATIUS LANZETTA,
MICHAEL FALCONE AND LOUIE DEL ROSSI,
Appellants,

vs.

THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF OF APPELLANTS.

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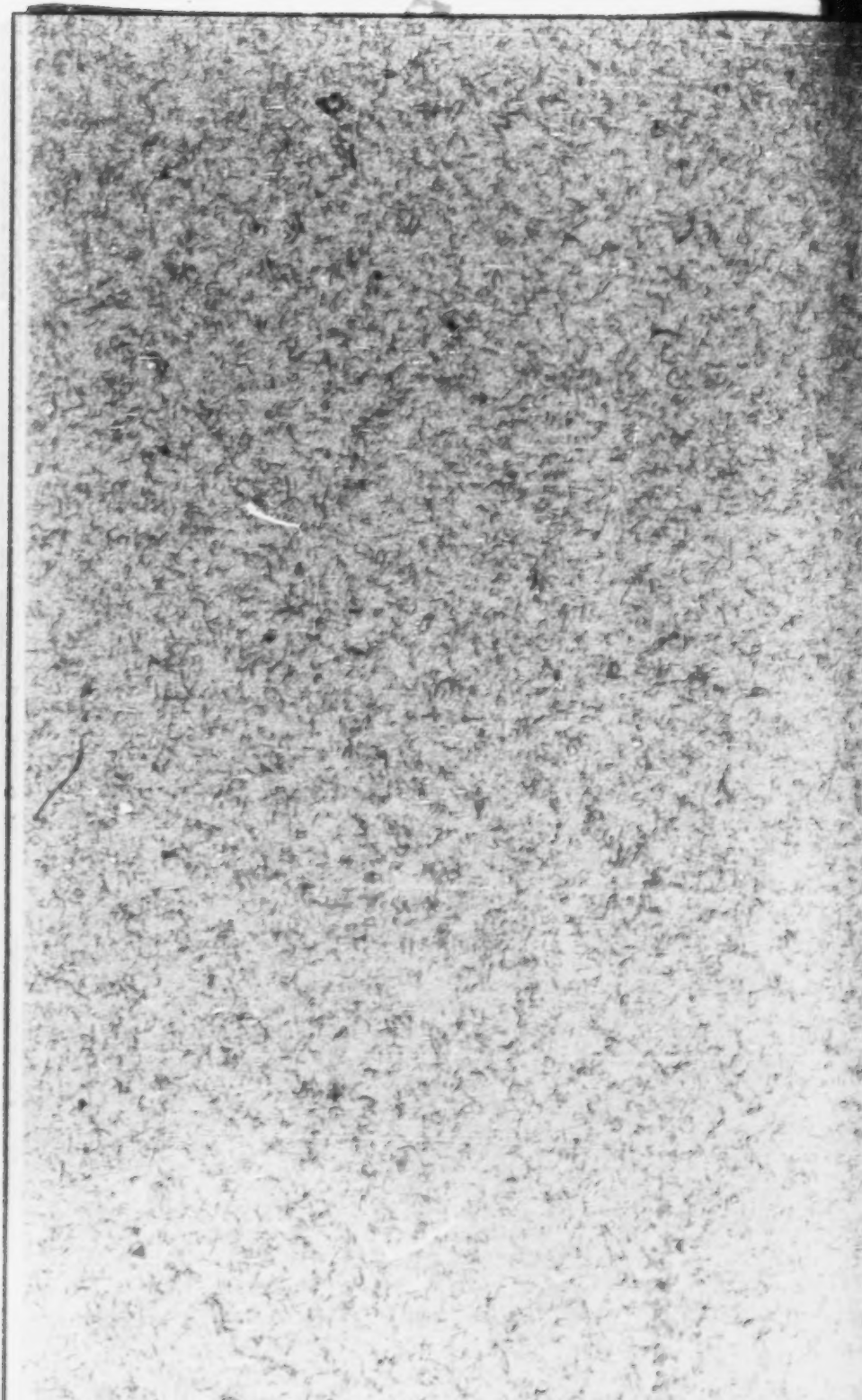

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I.

Opinions of the Courts Below.

The opinion in the Court of Errors and Appeals for the State of New Jersey is officially reported in 120 N. J. L. 189, and appears in the Record on page 72.

The opinion of the Supreme Court of the State of New Jersey is officially reported in 118 N. J. L. 212, 192 Atl. 89, and appears in this Record on pages 69 to 71, inc.

II.

Jurisdiction.

The statutory provision sustaining the jurisdiction of the United States Supreme Court is under Section 237 (a) of the Judicial Code, Act of February 13, 1925, Chapter 229, 43 Stat. 936, which reads as follows:

> "SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution, or remand the cause to the court from which it was removed by the writ."

A more detailed statement as to jurisdiction is omitted in the interest of brevity because Paragraph 1 of Rule 12 has been complied with and a concise statement of the grounds on which the jurisdiction of this Court is invoked, has been filed as provided in said rule.

III.

Statement of the Case.

The three defendants were convicted as "gangsters" under an indictment based on Section 4 of Chapter 155 of the Laws of 1934 (P. L., page 394) of the State of New Jersey.

The Section provided (R. 63):

> "Any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster."

The Fifth Section of said Statute (R. 69, 70) provides that upon conviction such person shall be guilty of a high misdemeanor and shall be punished by fine not exceeding $10,000.00 or imprisonment not exceeding twenty years, or both.

The defendants were sentenced by the Court of Quarter Sessions of Cape May County to a term of imprisonment of not less than five years nor more than ten upon a verdict of the jury which was "guilty, with recommendation to the Court for mercy" (R. 8).

During June of 1936 Ignatius Lanzetta, a resident of Philadelphia and a citizen of Pennsylvania, rented a summer home in Wildwood Crest, New Jersey, a vacation resort. This home was occupied by Lanzetta and his family and Del Rossi and his family. During July, Michael Falcone, the other defendant, visited the Lanzettas. He was a brother to the wife of William Lanzetta, a brother of Ignatius.

On July 24, 1936, Ignatius Lanzetta was arrested while he was reading in his home (R. 66). Louis Del Rossi was arrested on the street while he was walking with his wife (R. 65). Michael Falcone was arrested while he was seated in a parked automobile (R. 65). These arrests were without warrant. When the defendants were taken into custody by the police, they were not charged with crime but on the following day warrants were issued charging them with violation of the Gangster Law of 1934 (R. 23). It was not charged or proved that these men ever committed any crim-

inal offense in the State of New Jersey nor were they charged or shown to have been guilty of any disorderly conduct and so far as the evidence is concerned each of the defendants was shown to have been a well behaved person at all times within the State of New Jersey (R. 65, 66).

While they were in police custody, the defendants were questioned and they gave their respective addresses, each in the City of Philadelphia, State of Pennsylvania, and upon questioning as to their occupations, Lanzetta stated he was a machine fixer. Falcone stated he was a bricklayer and Del Rossi stated he was a chauffeur (R. 19, 20). The Philadelphia Police admitted that there were no criminal charges pending against the defendants in Philadelphia (R. 39).

The State obtained a conviction on evidence showing (1) that the defendants were convicted of crime in Pennsylvania prior to the passage of the Gangster Law of 1934; (2) that they were "known" to the Philadelphia police to be members of the Lanzetta gang which operated in Philadelphia, Pennsylvania, and (3) that they were not engaged in lawful occupation at the time of their arrest.

The constitutional objections to the validity of such statute were raised in the Cape May County Quarter Sessions Court in the first instance by a motion to quash indictment (R. 9). The Court of Quarter Sessions, after argument, denied said motion to quash and exception was granted thereto (R. 14).

Upon appeal to the New Jersey Supreme Court, an Appellate Court of first resort, said constitutional objections were raised in the assignments of error and argued on appeal (R. 1).

The opinion of the Supreme Court in a decision by Parker, J., which considers and refers to such constitutional objections raised by petitioners, appears in the Record at pages 69, 70 and 71, and the pertinent portion thereof is as follows:

"The second main point is that Chapter 155 of P. L. 1934 is unconstitutional. For this four grounds are specified. Two are substantially the same, viz. due process of law, guaranteed by the fifth and fourteenth amendments of the Federal Constitution. As to these, we are content to rest on the very recent decision of this Court in State *v.* Bell, 15 Misc. 109, 188 Atl. 757. 'Double jeopardy' is claimed; but no prior conviction or indictment was even suggested. It will be time enough to take up this point when there is a second indictment for the same offense. Further, it is specified in the brief that 'the vagueness and indefiniteness of the act would create concurrent jurisdiction in every county in the State.' No doubt such concurrent jurisdiction would exist in every county where the act is violated; as indeed it should exist. Finally, that the act is ex post facto in this case because the Pennsylvania convictions of crime that were proved as an element of the present statutory offense, took place some years ago. But the statute is not aimed at punishing convicted criminals because they are convicted criminals, but because, being such, they become members of a gang organized to plot and commit further crimes, and neglect or refuse to engage in any lawful occupation. The act is therefore predicated on two present and voluntary acts of the party, both of which must concur; voluntary membership in a gang; and voluntary abstention from work. We see no *ex post facto* legislation here.

"Finding no legal error properly laid before us under this writ, the judgment of conviction is affirmed."

These constitutional objections were again raised in the New Jersey Court of Errors and Appeals (R. 67). The Court of Errors and Appeals, in a *per curiam* opinion filed April 29, 1938, stated (R. 72):

"We are in full accord with the reasoning and result reached by the Supreme Court. We desire merely to mark the fact that the case of State *v.* Bell, 15 N. J. Mis. R. 109, 188 Atl. 737, relied upon by the court below

as dispositive of the contentions that our Gangster Act (1 Rev. Stat. (1937) 2:136-4 (Ch. 155, P. L. 1934, p. 794), trenches upon both Federal and State constitutional inhibitions, has recently been affirmed by this court *sub nomine* State *v.* Gaynor, 119 N. J. L. 582, 197 Atl. 360.

Accordingly, the judgment under review is affirmed with costs."

IV.

Specifications of Error.

1. The New Jersey Court of Errors and Appeals erred in failing to decide that Section 4 of Chapter 155, P. L. 1934, violated the Fourteenth Amendment of the Federal Constitution in that it denied due process of law.

2. The New Jersey Court of Errors and Appeals erred in failing to decide that Section 4 of Chapter 155 of the Laws of 1934, violated privileges and immunities guaranteed to appellants as citizens of the United States, under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The New Jersey Court of Errors and Appeals erred in failing to decide that Section 4 of Chapter 155 of the Laws of 1934 violated the Tenth Section of Article 1 of the Constitution of the United States, which prohibits the States from passing *ex post facto* laws.

4. The New Jersey Court of Errors and Appeals erred in giving final judgment sustaining the judgment of the Supreme Court of New Jersey holding that Chapter 155, P. L. 1934, is a constitutional statute.

5. The New Jersey Court of Errors and Appeals erred in failing to acquit and discharge the appellants of the charges set out in the indictment, to wit, being gangsters in violation of Section 4 of Chapter 155 of the Laws of 1934.

V.

ARGUMENT.

Summary of Argument.

Point A—The statute in invalid because it violates the due process clause of the Constitution.

Point B—The statute is invalid because it denies the equal protection of the laws.

Point C—The statute is *ex post facto*.

Point A.

The Statute is Invalid Because it Violates the Due Process Clause of the Constitution.

The question here presented is whether citizens of Pennsylvania who were vacationing with their families at a New Jersey summer resort and who, at all times within the State of New Jersey, had conducted themselves in a well behaved and lawful manner, can be arrested, convicted and sentenced to a term of imprisonment of not less than five years nor more than ten years under a statute which provides, *inter alia* (R. 63):

> "Any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster."

The State obtained a conviction by proving:

(1) That defendants were convicted of crime in Pennsylvania prior to the date this statute became a law.

(2) That defendants were "known" by the Philadelphia police to be members of the Lanzetta gang of Philadelphia, Pennsylvania.

(3) That they were unemployed at the time of the arrests.

We most respectfully submit that this statute is invalid because it is vague, indefinite and uncertain.

The statute permits the conviction of a person who has not committed an act of commission forbidden by criminal statute or an act of omission required by criminal statute. It permits the conviction of a person whose status is stated in the act irrespective of criminal intent. The present case clearly illustrates these conditions. Appellants were not shown to have been guilty of any unlawful conduct at any time in the State of New Jersey. There is affirmative evidence in this record which shows that although the Philadelphia Police testified the defendants were "known to be members of a gang" engaged in gambling activity, there were no criminal charges pending against any of them (R. 39).

It will be observed that under the statute, *supra*, proof of membership in a gang is not required. All that the statute requires is that the person be "known to be a member of any gang". "Known" is defined in Funk & Wagnall's New Standard Dictionary as "apprehended mentally", "recognized", "understood", and the synonyms mentioned, are "eminent," and "notorious". "Notorious" is defined as "being publicly or widely known, subject of general remark".

Under the language of this statute, a man might be a member of a gang but unless he was "known to be a member of a gang", he would escape conviction. The statute therefore appears to be vague and indefinite and not susceptible of reasonable interpretation, for one would be led to inquire at once: By whom is he to be known as a member

of a gang? What person must possess that knowledge? Does it mean that the knowledge must be possessed by neighbors or police in the locality or does it mean knowledge of persons in some far-off, distant place? As to these essential guides, the act is altogether silent. Criminal statutes which are carelessly drawn and which cannot be reasonably interpreted, are unenforceable and invalid.

Furthermore, the definition of a "gang" is left entirely to imagination. A gangster is defined in the statute, but the word "gang" is not defined.

A gang may be an innocent combination of persons so that the word "gang" is entirely without definition and leaves the odious acts denounced entirely to the imagination, caprice or whim of the person who is called upon to testify that the defendant is a known member of a gang.

The same situation exists with respect to the occupation feature of the statute. The circumstance which is denounced is a "person not engaged in lawful occupation". This would permit the conviction and punishment of a person who is so unfortunate as to be among the unemployed because of economic depression. If the Legislature did not intend to bring this innocent and unoffending group within the purview of the statute, it could have so worded the statute to have excluded them.

The Act does not create a criminal act of either omission or commission. It merely describes a "gangster" and prescribes for his punishment. In other words, it defines a status which we respectfully urge does not rise to the stature of a crime. This was clearly decided in

Goodman v. *Kinkle Warden*, 77 F. (2d) 623 (C. C. A., 7th Circuit),

where the Court said, "Habitual criminality is a state and not a crime."

This Court has repeatedly held that statutes which are vague, indefinite and uncertain and which do not fix ascertainable standards of guilt are constitutionally invalid.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, this Court said (page 520):

> "Therefore, because the law is vague, indefinite, and uncertain, and because it fixed no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained." * * *
>
> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against."

The rule was reaffirmed in *Connolly, Commissioner*, v. *General Construction Company*, 269 U. S. 385, 70 L. Ed. 322 in these words (page 328):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who

are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Co. *v.* Kentucky, 234 U. S. 216, 221, 58 L. Ed. 1284, 1287, 34 Sup. Ct. Rep. 853; Collins *v.* Kentucky, 234 U. S. 634, 638, 58 L. Ed. 1510, 1511, 34 Sup. Ct. Rep. 924."

In *People* v. *Belcastro*, 356 Ill. 144, 190 N. E. 301, a statute similar to the one in this case was declared unconstitutional. The statute provided, *inter alia* (pages 302, 303):

"* * * all persons who, not being persons authorized by law to carry concealed upon or about their persons deadly weapons, are *reputed* to be habitual violators of criminal laws of this State or of the United States, or to habitually carry concealed on or about their persons or in motor vehicles or other conveyances, pistols, revolvers, or other firearms * * * and all persons who are reputed to act as associates, companions or bodyguards of such persons reputed as aforesaid. * * * shall be deemed to be, and they are declared to be vagabonds." Ill. Rev. Stat. (1935), Sec. 38, P. 606. (Italics supplied.)

In holding this statute to be invalid, the Court said (pp. 303, 304):

"* * * the amendment to the Vagrancy Act as above quoted is unconstitutional, as it seeks to punish an individual for what he is reputed to be regardless of what he actually is. * * *

"To say that certain acts shall constitute a crime and to fix the punishment therefor, is indisputably a part of the police power of the State. This power must be exercised, however, not as an unlimited authority, but

at all times subject to the mentioned restrictions in the Federal and State constitutions. * * *"

(P. 303:)

"When we consider the phrases 'reputed to be' and 'who are reputed to act', and the word 'reputed' as used in the amendment to the act, we are dealing with something which lacks body or substance. The word 'repute' when used as a noun, is defined in Webster's New International Dictionary as 'opinion, estimation or judgment'. When used as a verb the same authority defines it as 'to hold in thought, to esteem, to hold, the think, to attribute or to impute.' As used by the Legislature in the amendment, the word 'repute' used alone or as a part of the phrases mentioned, is synonymous with the words 'reputation' and 'opinion'. *As the act now stands it is silent as to the degree or extent of reputation or opinion necessary to warrant action under the amendment. The Legislature has left this important question of reputation to be arbitrarily decided by individuals, without prescribing any rules, basis, or limitations to act as a guide in forming judgment.* * * *"

(P. 304:)

"The ascertainment of a person's reputation may, and generally does, mean only the collection of expressions of opinion from different people. Once collected you have something you can rarely demonstrate as an existent fact. One's reputation might be good among one class of people or in one section of the city and bad among other classes or in other localities. Applying these observations to the amendment under consideration, it will be seen that the reputation of one charged with the crime of vagrancy may arise out of the collected opinions of law enforcement officers on the one hand and of his neighbors, business men, and friends on the other. So far as the amendment is concerned, these opinions will all be formed without the aid of

rules, limitations, or restrictions to guide them. For such proof to be submitted means that a court is bound to say that a person is a criminal because of a reputation resulting from opinions which may or may not be true. The establishment of a reputation required under the amendment means that a witness will be testifying to opinions—not to facts. * * * Here the corpus delicti must be proved by reputation, which might easily be based upon supposition or rumor rather than upon knowledge. Character is what a person is, reputation is what he is supposed to be. * * * If the Legislature leaves to administrative officers the determination of what the law shall be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. 1 Sutherland on Stat. Const. (2d Ed.) p. 148." (Italics supplied.)

The authorities dealing with this subject are carefully considered and reviewed in *United States* v. *Armstrong*, 265 Fed. 683, where defendant was charged with a violation of the Food Control Act passed by the War Congress in 1917, as follows (p. 687):

"In general it may be said that a criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it, and, if deviation from a standard is prohibited, the standard must be definitely fixed. In Railway Co. *v.* Dey (C. C.), 35 Fed. 866, 1 L. R. A. 744, Justice Brewer said:

" 'No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'

"In Tozer *v.* United States (C. C.) 52 Fed. 917, the Court said:

" 'In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty.'

"In United States *v.* Brewer, 139 U. S. 278 on page 288, 11 Sup. Ct. 538, on page 541 (35 L. Ed. 190) the Supreme Court said:

" 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States *v.* Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States *v.* Lacher, 134 U. S. 624, 628.' "

In discussing the "due process" clauses of the fifth and fourteenth amendments to the Constitution, the Court further stated (p. 689):

"By the simplest and plainest rules of construction, the words 'due process of law' must have the same meaning in the fifth and fourteenth amendments. This has been so stated in Hurtado *v.* California, 110 U. S. 516, 28 L. Ed. 232. • • •

"The Supreme Court has repeatedly been called upon to decide whether certain classifications in State statutes were reasonable or arbitrary, and whether they were in conflict with the fourteenth amendment. In Caldwell *v.* Texas, 137 U. S. 692, 697, 11 Sup. Ct. 224, 226 (34 L. Ed. 816), the Court had before it the validity of a State statute under this amendment, and it said:

" 'By the fourteenth amendment the powers of the States in dealing with crime within their borders are

not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent. Comm. 13. And due process is as secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank of Columbia *v.* Okely, 4 Wheat 235, 244.'

"And in Grozza *v.* Tiernan, 138 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599, the Supreme Court said again:

"'Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.'

"McGehee on Due Process of Law, p. 60, says:

"'Purely arbitrary decrees or enactments of the Legislature, directed against individuals or classes are held not to be "the law of the land", or to conform to "due process of law".'

Whenever the government undertakes to deprive a person of his liberty, as a punishment for crime, it must do it by virtue of a valid, constitutional statute defining the crime, and such a statute is required by the 'due process' clause of the fifth amendment. The statute upon which a person is deprived of his liberty is a part of the process of law which is used against him, and it must be 'due process of law' * * *."

A similar question was passed on in *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 18 Ann. Cas. 68, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate

passengers "without crowding" was held invalid for uncertainty, the Court said:

> "* * * What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what constitutes a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.
>
> "* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. * * *"

The case last cited is considered and referred to in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, at page 522 in a marginal statement. It is considered and approved in *Connolly* v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322, *supra*, at page 329.

The objections pointed out in the Statutes considered in the foregoing cases are present in this case. In this case the word "known" is used instead of "reputed" as in *People* v. *Belcastro, supra.* Here the legislature used the word "gang" whereas in the case of *United States* v. *Capital Traction Co., supra*, the words "crowded cars" were

used. In *United States* v. *Cohen, supra,* as in this case no specific or definite act was forbidden by statute.

In *Dirk DeJonge* v. *State of Oregon*, 299 U. S. 353, 366, 81 L. Ed. 278, the Criminal Syndicalism Law of the State of Oregon was held to be repugnant to the due process clauses of the fourteenth amendment. The Act defined "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution". It provided *inter alia,*

> "Any person * * * who shall organize or help organize or solicit or accept any person to become a member of any society * * * which teaches or advocates criminal syndicalism * * * or any person * * * who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization * * * which teaches the doctrine of criminal syndicalism * * * is guilty of a felony * * *."

The charge was that DeJonge assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The State failed to prove that criminal syndicalism or any unlawful conduct was taught or advocated at the meeting. Upon conviction defendant was sentenced to imprisonment for a term of seven years. In setting aside the conviction and holding that the Oregon Statute, as applied to the particular charge, was repugnant to the due process clause of the fourteenth amendment, this Court, in an opinion by Mr. Chief Justice Hughes said (p. 362):

> "Conviction upon a charge not made would be sheer denial of due process. It thus appears that, while defendant was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distrib-

uting its literature. He was not charged with teaching or advocating criminal syndicalism or sabotage or any unlawful acts, either at the meeting or elsewhere. He was accordingly deprived of the benefit of evidence as to the orderly and lawful conduct of the meeting and that it was not called or used for the advocacy of criminal syndicalism or sabotage or any unlawful action. His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.

"The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker although not a member, who 'assisted in the conduct' of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney General made, and could not avoid in the light of the decision of the state court. Thus if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party although held for the discussion of political issues or to adopt protests and pass resolutions of an entirely innocent and proper character."

In the *DeJonge* case the conviction was sustained on the theory that DeJonge was a member of the Communist Party, that he attended a meeting held under the auspices of that Party which advoca d doctrines which were denounced under the Oregon Statute. The conviction was set aside because the defendant was not shown to have committed any unlawful act. In the instant case, the statute denounces a "gangster" and provides for his punishment, but the State has wholly failed to prove that defendants committed any unlawful act.

In *Herndon* v. *Lowry*, 301 U. S. 242-278, 81 L. Ed. 1066, a Communist was charged and convicted of violating a Georgia Statute which made criminal any attempt to incite insurrection. When arrested, defendant had in his possession and in his room certain documents and papers dealing with the Communist Party and other subjects which the State contended were intended to incite insurrection. There was no evidence that appellant distributed any writings or printed matter which advocated forcible subversion of governmental authority. In a majority decision setting aside the conviction, this Court in an opinion by Mr. Justice Roberts said (pp. 261, 262):

> "The Statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. The Act does not prohibit incitement to violent interference with any given activity or operation of the State. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendar 's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. *Nor is any specified conduct or utterance of the accused made an offense.* • • • The law, as thus construed, licenses the jury to create its own standard in each case. In this aspect what was said in United States v. L. Cohen Grocery Co., 255

U. S. 81, 65 L. Ed. 516, 41 S. Ct. 298, 14 A. L. R. 1045, is particularly apposite:

"'*Observe that the section forbids no specific or definite act.* It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury * * *'" (p. 89). (Italics supplied.)

We respectfully urge that if in the *Herndon* case defendant's constitutional privileges are violated if he is convicted without proof of some definite unlawful act on his part, then that principle is applicable to this case because the defendants were not shown to have committed an unlawful act.

The objections pointed out in the cited case are equally applicable to this case. This act does not furnish a "sufficiently ascertainable standard of guilt" nor does it "forbid specific or definite acts."

The Supreme Court of New Jersey, whose decision was affirmed, in a *per curiam* opinion, by the New Jersey Court of Errors and Appeals, in disposing of appellants' constitutional objections to the statute, said (R. 69, 70):

"But the statute is not aimed at punishing convicted criminals because they are convicted criminals, but because, being such, they become members of a gang organized to plot and commit further crimes, and neglect or refuse to engage in any lawful occupation. The act

is therefore predicated on two present and voluntary acts of the party, both of which must concur; voluntary membership in a gang; and voluntary absentation from work."

It will be at once observed that the Court added to the language of the statute in order to give it effect. The Court said, "The act is therefore predicated on two present and *voluntary* acts of the party, both of which must concur; *voluntary* membership in a gang; and *voluntary* absentation from work." *The Act does not make voluntary membership in a gang and voluntary absentation from work essential elements of the offense.* On the contrary the Act merely declares that one known to be a member of a gang and without lawful occupation are the essential parts of the essence of the crime.

We do not think that the Court can introduce new conditions in a Statute in order to give it effect. If the Court should have this right, the conviction in this case must be set aside because *there is not a scintilla of evidence to show the existence of the "two present and voluntary acts of the party". There is no testimony in this entire record which shows that any of these defendants were members of the Lanzetta gang at the time of their arrest.* The evidence on the contrary was that they were "known" to be members of the gang. There is no testimony whatever to show that the defendants *voluntarily abstained from work.*

We respectfully urge, therefore, that the statute is unconstitutional and that the conviction of appellants thereunder was a denial of due process.

POINT B.

The Statute Denies the Equal Protection of the Laws.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374, 30 L. Ed. 220, in discussing the Fourteenth Amendment to the Constitution, this Court said (p. 226):

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

And it was further said (p. 227):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered, by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson *v.* Mayor, etc., of New York, 92 U. S. 259 (Bk. 23, L. Ed. 543); Chy Luny *v.* Freeman, 92 U. S. 275 (Bk. 23 L. Ed. 550); *Ex parte* Va., 100 U. S. 339 (Bk. 25 L. Ed. 676); Neal *v.* Delaware, 103 U. S. 370 (Bk. 26, L. Ed., 267), and Soon Hing *v.* Crowley (*supra*)."

Mr. Justice Fuller said in *McPherson* v. *Blacker*, 146 U. S. 1, 36 L. Ed. 869:

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of

persons from being singled out as a special subject for discriminating and hostile legislation."

Appellants contend that these principles of law are applicable to the facts in this case.

The statute under which appellants were indicted and convicted provided that one of the three essential elements of a "gangster", was a person who was convicted of a crime "in this (State of New Jersey) or any other state." Therefore, a person convicted of crime in any of the forty-eight States of the Union who is known to be a member of a gang and without lawful occupation, is declared to be a gangster and as such punishable under the Act. On the other hand, a person who was convicted of a crime in the District of Columbia or any territory of the United States who is known to be a member of a gang and without lawful occupation, is not subject to the operation of the Act. Both citizens, however, possess identical characteristics and are of the same class and no reasonable basis exists to justify any differentiation.

Inhabitants of the District of Columbia and of a territory, though citizens of the United States, are not citizens of a State within the meaning of the Constitution.

Hepburn v. *Ellzey*, 2 Cr. 445, 2 L. Ed. 332;
Reilly v. *Lamar*, 2 Cr. 344, 2 L. Ed. 300;
Barney v. *Baltimore City*, 6 Wall. 280, 18 L. Ed. 825;
New Orleans v. *Winter*, 1 Wh. 91, 4 L. Ed. 44;
American Ins. Co. v. *Canter*, 1 Pet. 511, 7 L. Ed. 242.

As a substantial legal distinction exists between a State and a territory, it cannot be reasonably argued that the use of the word "state" in the statute, embraces and includes a territory.

Reducing this contention to its practical effect, we have between a citizen of the United States convicted of crime

in a territory, and a citizen convicted of crime in a State, an unequal and discriminatory application under this Statute. The citizen who was convicted in a State would be subject to the provisions of the statute; whereas the citizen convicted of a crime in the District of Columbia or a territory, would not be subject to the Act.

It is also an unreasonable classification in a criminal statute to say to a person who may have visible means to support himself without engaging in gainful employment, that he must work because he has been convicted of a prior crime; whereas, as to another who has not been convicted of prior crime, there is no such requirement.

The provision in the Fourteenth Amendment which guarantees that a person shall not be deprived of life, liberty or property without due process of law, gives him the right to pursue any lawful occupation or vocation not inconsistent with the rights of others. It includes the right of contract, the right to transact business and it certainly means that he is privileged to follow no occupation or vocation if he has the financial means to maintain himself. We recognize the right of a sovereignty to require a citizen to bear arms or to render war time service but no such extraordinary circumstances are present in this case.

We earnestly urge that to require a person, who is financially able to live a life of leisure and who desires to enjoy the fruits of his property in this manner, to engage in an occupation or employment, is a plain and unwarranted deprivation of his property rights.

Appellants were undeniably engaged in a lawful pursuit at the time of their arrest—they were vacationing with their families—and it is not contended or proven that they were without visible means to enjoy this leisure.

This classification is unjust insofar as it relates to citizens or residents of the State of New Jersey, but it is especially unjust and oppressive to appellants, who were

in the State of New Jersey only temporarily; it is an attempt on the part of the State of New Jersey to assume an extra-territorial jurisdiction over citizens and residents of the State of Pennsylvania.

We concede that under proper circumstances the State of New Jersey can punish a person who is not engaged in lawful occupation; for instance, vagrants who have no visible means of support, but it is quite a different thing for the State of New Jersey to say to a citizen of Pennsylvania who has visible means of support and who desires to enjoy a lawful pursuit, that he cannot enter New Jersey because he is not engaged in an occupation.

We respectfully submit that under the Fourteenth Amendment to the Constitution, such an unreasonable and arbitrary classification is not permitted.

POINT C.

The Act is ex Post Facto.

Appellants contend that the Act violates Section 10 of Article 1 of the Federal Constitution which prohibits the States from passing *ex post facto* laws. The statute under which appellants were indicted and convicted, was enacted in 1934 (R. 63). The prior convictions upon which the State relies to sustain a conviction as to appellants, occurred many years before this statute was passed. As to Lanzetta, the conviction occurred on April 3, 1924; as to Del Rossi, March 2, 1927; as to Falcone, November 30, 1921.

The offense denounced under the statute is "gangster". The statute declares a gangster is a person (1) who is without lawful occupation; (2) who is known to be a member of any gang; (3) who has been convicted of prior crime. These three elements must concur to constitute a "gangster". As to each of the appellants, therefore, the State in order to prove an offense of "gangster", relied upon an

act which occurred years prior to the enactment of the statute.

Prior conviction, being one of the essential elements of the offense, was set forth in the indictment (R. 5); it was proved at the trial (R. 39), and the trial judge in charging the jury stated (R. 64):

> "They (the state) must also prove under the elements which are set up under the act, first, that these defendants, each of them, had no lawful occupation and, second, that they were known to be members of a gang consisting of two or more persons; *third, that they were convicted at least three times of being a disorderly person or that they were convicted of crime in this or any other state.*" (Italics supplied.)

In *Jaehne* v. *New York*, 128 U. S. 189, 32 L. Ed. 398, this Court said (p. 400):

> "'A legislative act may be entirely valid as to some class of cases and clearly void as to others. *A general law for the punishment of offenses which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective;* but such invalidity will not affect the operation of the law in regard to the cases which were within the legislative control.' (Italics supplied.)
> Cooley Const. Lim. 5th Ed. 215."

In *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, Mr. Justice Chase, in discussing *ex post facto* laws, said (p. 650):

> "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law

annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. * * * But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction."

In *ex Parte Garland*, 71 U. S. 333, 18 L. Ed. 366, an Act of Congress was passed in 1865 requiring attorneys who desire to be admitted to the courts of the United States, to take an oath prescribed by an earlier Act of 1862 pertaining to Federal office holders. The supplementary Act provided that if any person took a false oath, he shall be guilty of perjury and subject to the penalties for that offense. The petitioner was ineligible to take said oath because he had borne arms for the Confederate States against the Union during the Civil War and the oath required that he swear that he had never supported a government hostile or inimical to the government or Constitution of the United States.

In holding the Statute to be *ex post facto*, the Court said (p. 369):

"The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the Courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree or perpetual exclusion. And exclusion from any of the professions or

> any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." • • •
>
> "In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and *for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an ex post facto law.*" (Italics supplied.)

We consider the *Garland* case especially pertinent because one of the essential elements of the offense of gangster relates to a past act. The effect of the Act is to make the prior conviction an unlawful element and to add a new and greater punishment.

In *McDonald* v. *Massachusetts*, 180 U. S. 311, 45 L. Ed. 542, the Habitual Criminal Act of Massachusetts was declared constitutional, and the statute provided:

> "Whoever has been twice convicted of crime, sentenced and committed to prison in this or any other state, or once in this and once at least in any other state for terms of not less than three years each, shall *upon conviction of a felony committed in this state* after the passage of this Act, be deemed to be an habitual criminal and shall be punished by imprisonment in the state prison for twenty-five years:"

The Court said (pp. 546, 647):

> "The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment, on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.
>
> "But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and

simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another state, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the Statute of 1827, chap. 118, Sec. 19, and by the Revised Statutes of 1836, chapter 133, Sec. 13. It is within the discretion of the legislature of the state to treat former imprisonment in another state as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. *The allegation of previous convictions is not a distinct charge of crime,* but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not *ex post facto.*" (Italics supplied.)

In the *McDonald* case, the Court clearly indicated that if punishment was imposed for an act other than a future crime, the law would have been *ex post facto.* This important distinction is pointed out by the Court in the *McDonald* case where the Court said:

> "The punishment is for the new crime only, but is heavier if he is an habitual criminal."

The Court further pointed out:

> "The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute and goes to the punishment only. The statute imposing a punishment on none but future crimes, is not *ex post facto.*" (Italics supplied.)

Here, however, the Act does not provide for punish for "future" crime. The only crime provided for is t of "gangster", an essential element of which is proof prior crime.

In *Graham* v. *W. Va.*, 224 U. S. 613, 56 L. Ed. 917, t *McDonald* case was considered and approved. In hold that the Habitual Criminal Act of Virginia was constitutional, it was pointed out that the prior conviction w merely an incident rather than an essential element of t offense. The Court said (p. 921):

> "In the present case, it was not charged in the i dictment on which the prisoner was last tried, th he had previously been convicted of other offenses, b after judgment he was brought before the Court of a other county, in a separate proceeding instituted b information and on the finding of the jury that he w the former convict, he was sentenced to the additiona punishment which the statute in such case prescribed."

In the instant case, as we have shown, the prior convic tion was a distinct allegation in the indictment and was a inseparable element of the crime.

We most respectfully submit that this statute, in so fa as it affects appellants, is an *ex post facto* law.

Conclusion.

Appellants have been convicted and sentenced under a statute which is repugnant to Section 10 of Article 1, an the Fourteenth Amendment to the Constitution of th United States, and the judgment of conviction upon whic appellants have been sentenced, should be reversed and the appellants should be discharged from imprisonment.

Respectfully submitted,

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